



Date: October 7, 2014

To: Thomas J. Bonfield, City Manager

Through: W. Bowman Ferguson, Deputy City Manager

From: Joel V. Reitzer, Jr., Director, General Services Department

Subject: Third Modification of the Air Lease by and between City and County of Durham and Shaner SPE Associates Limited Partnership

Executive Summary

Shaner SPE Associates Limited Partnership (Shaner), the owner of the Marriott hotel at the Durham Convention Center (DCC), filed a lawsuit against the City and County of Durham (Owners) approximately two years ago, alleging the hotel owner was entitled to use various DCC spaces. The City and the County counterclaimed for the rental value of DCC spaces that Shaner refused to vacate when its contract to manage the DCC ended. Some of the spaces had been occupied by Shaner since its purchase of the hotel, and had been occupied by the prior hotel operator.

The parties have worked together diligently to seek resolution not only of the space allocation issues in the lawsuit, but also of other issues inherent in the operational relationship between the hotel and the DCC. The discussions have been fruitful in understanding the hotel's space needs and seeking to address them in ways that are workable for the DCC. The Owners and Shaner have also addressed in this third Modification (additionally to issues in the lawsuit) the allocation of costs for water/sewer and electricity. The costs for these utilities have been shared 50/50 between the hotel and DCC.

This Third Modification of the Air Lease places into effect the provisions of the Settlement Agreement filed with the court. It provides new spaces under the Air Lease for the hotel use, and splits the costs for water/sewer billings, 2/3 to the hotel and 1/3 to the DCC, and costs for electricity billings split 50/50, until consultants determine a just apportionment and algorithm to update these proportional charges annually.

The County of Durham approved the proposed Third Modification of the Air Lease at its work session on October 6, 2014.

Recommendation

The Department of General Services recommends that City Council:

Pursuant to Section 86 of the City Charter, amend the air lease by and between the City of Durham, County of Durham and Shaner SPE Associates Limited Partnership as described in the Third Modification of the Air Lease, and authorize the City Manager and

City Attorney to execute the Third Modification and other legal documents as necessary to settle the lawsuit.

Background

On October 9 1987, City and County of Durham entered into a lease contract with Durham Hotel Company for the premises known as the Civic Center Hotel (the Air Lease). On or about July 9, 1996 Durham Hotel Company, with the consent of the Owners, assigned its interest in the Air Lease to Shaner Hotel Group Properties Two Limited Partnership. Shaner later assigned its interest as "Tenant" to a new entity, Shaner SPE Associates Limited Partnership. The first modification of lease was entered into on or about May 19, 1989 to revise the legal description of the property description for hotel air space. The second modification of lease was entered into on or about July 26, 1997, and added definitions to the lease, added assignment provisions and increased the rent paid by the hotel. Since assignment of the lease to Shaner, Shaner served as both hotel and convention center manager through December 31, 2010. Beginning January, 2011 the Durham Convention Center management contract was awarded to Global Spectrum, LP, while the hotel Air Lease has remained with Shaner.

About two years ago, Shaner filed a lawsuit alleging the hotel owner was entitled to use various DCC spaces that they occupied as manager of the DCC, although Shaner no longer manages the DCC. The Third Modification of the Air Lease (Third Modification) addresses previously disputed areas, and identifies spaces to be used by the hotel owner as Tenant. The spaces are identified on Exhibit G to the Third Modification and are titled "Retail Space" and include spaces currently utilized by the hotel, including the hotel fitness center, hotel administration offices, hotel bellman closet, and hotel kitchen. In addition, space currently utilized by the Durham Convention Center as storage and formerly leased to a limousine company, is included in the "retail space" as lease space for the hotel general manager. This amendment includes allocation of space to the hotel for its continued management and is an appropriate designation of space for hotel usage. Further, the Owners will provide the hotel operator and operating personnel access to the employee dining room and the security office as an accommodation. Tenant is responsible for maintaining, cleaning and repairing the "retail space" leased by Tenant. For the accommodation areas, the cleaning and maintenance will be mutually agreed upon in writing by the hotel and DCC managers.

The Third Modification revises the current allocation formula for water/sewer utilities resulting in a 2/3 and 1/3 allocation, with Shaner responsible for 2/3 of the billings and the DCC responsible for 1/3 effective August 1, 2014. The electricity billings will remain at 50/50 split between Shaner and DCC pending engagement of outside consultants and resolution of just apportionment moving forward. Outside consultants will be engaged to determine a just apportionment of the utilities billings for water/sewer and electricity and an algorithm to update these proportional charges annually.

Issues/Analysis:

By approving the third modification of the air lease, issues regarding leasehold interests and ownership will be resolved via the lease document and in furtherance of the appropriate needs of the hotel and the convention center.

Alternatives:

There are no viable alternatives as the third modification comports to the terms of the settlement agreement between the parties.

Financial Impact:

None

SDBE summary

Not applicable

Attachment

- Third Modification of the Air Lease